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## Constitutional Chronometry, Legal Continuity, Stability and the Rule of Law: A Canadian Perspective on Aspects of Richard Kay's Scholarship

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## Essay

### Constitutional Chronometry, Legal Continuity, Stability and the Rule of Law: A Canadian Perspective on Aspects of Richard Kay's Scholarship

WARREN J. NEWMAN

*The United States and Canada have many common traits, including a constitutional heritage originally derived in part from British common law and statute, a written constitution declared to be supreme law, a federal and local state (or provincial) division of legislative powers, an entrenched bill of rights, written procedures for constitutional amendment, and constitutional judicial review. However, while the United States has a presidential and congressional system of government, Canada is a constitutional monarchy with a parliamentary system of responsible government. Moreover, unlike the United States, Canada achieved its independence from the United Kingdom gradually and incrementally, within the existing legal and constitutional framework. The corollary to this evolution is that there is no predominant revolutionary tradition or discourse in Canadian constitutional discourse or jurisprudence. Canadian legal and political culture places great value on the maintenance of legal continuity and stability, and in adhering to prescribed forms and processes of law-making.*

*Professor Richard Kay's scholarship has long explored the nature and essence of American constitutionalism and the importance, in that tradition, of its commitment to a written document. And in his master work, *The Glorious Revolution and the Continuity of Law*, he examined the fraught and tenuous relationship between law and revolution. The following essay examines Professor Kay's article, "Constitutional Chronometry," and tests some of the ideas and assumptions therein, notably from a Canadian perspective. The essay concludes that revolutionary breaks with existing constitutional and legal orders are not the inevitable outcomes of anachronistic constitutions, however much revolutionaries may attempt to justify their actions *ex post facto* in that light. If revolutions do occur and liberal constitutions are overthrown, it will not be because the constitutions themselves are out of date, but because the commitment to constitutionalism itself has been abandoned.*

## ESSAY CONTENTS

|   |      |
|---|------|
| PREFATORY REMARKS .....   | 1435 |
| I. CANADA AND THE UNITED STATES: POINTS OF<br>CONSTITUTIONAL CONVERGENCE AND DIVERGENCE.....                | 1436 |
| II. NO PREDOMINANT REVOLUTIONARY TRADITION IN<br>CANADIAN CONSTITUTIONAL DISCOURSE OR<br>JURISPRUDENCE..... | 1437 |
| III. RICHARD KAY'S <i>CONSTITUTIONAL CHRONONOMY</i> .....   | 1441 |
| IV. CONSTITUTIONAL AND REVOLUTIONARY CHANGE.....  | 1447 |
| V. CONSTITUTIONAL CHRONOMETRY AND THE FUTURE REACH<br>OF COMPARATIVE CONSTITUTIONAL LAW .....               | 1449 |



# Constitutional Chronometry, Legal Continuity, Stability and the Rule of Law: A Canadian Perspective on Aspects of Richard Kay's Scholarship

WARREN J. NEWMAN \*

## PREFATORY REMARKS

I was honored and delighted to have taken part in the symposium at the University of Connecticut dedicated to the constitutional ideas of Professor Richard Kay. It has been a signal privilege and pleasure to know Rick Kay and his work for more than twenty years, in both my professional capacity as a constitutional lawyer with the Department of Justice of Canada, and in my academic capacity as a part-time professor at several Canadian law schools. Professor Kay's careful and profound scholarship, and his elegant and precise writing style, have been a constant and ready source of inspiration. My students in comparative constitutional law have particularly benefitted, over the years, from his masterful chapter on American constitutionalism in Larry Alexander's excellent collection on the philosophical foundations of constitutionalism, published by Cambridge University Press.<sup>1</sup>

Much of my own work and academic pursuits over the past forty years have involved existential questions relating to constitutionalism and the rule of law, legal stability and continuity, and constitutional change. In 1985 in the *Manitoba Language Rights Reference*, the Supreme Court of Canada struck down as invalid 90 years of laws enacted by the Legislature of the Canadian province of Manitoba, for want of compliance with a constitutional manner-and-form requirement going to the enactment of legislation.<sup>2</sup> In the *Quebec Secession Reference* in 1998, the Supreme Court had to determine whether the law of the Constitution of Canada

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<sup>1</sup> Richard S. Kay, *American Constitutionalism*, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 16–50 (Larry Alexander ed., 1998).

<sup>2</sup> Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721, 746 (Can.). On the reference mechanism in Canada, see Warren J. Newman, *Standing to Raise Constitutional Issues in Canada*, in *STANDING TO RAISE CONSTITUTIONAL ISSUES: COMPARATIVE PERSPECTIVES* 203–07 (Richard S. Kay ed., 2005); CARISSIMA MATHEN, *COURTS WITHOUT CASES: THE LAW AND POLITICS OF ADVISORY OPINIONS* 45–47, 58–59 (2019).

applied to the secession of the province of Quebec from Canada, such that for secession to be lawful, a constitutional amendment would be required.<sup>3</sup> More recently, in the *Senate Reform Reference*, the Court had to determine whether proposed legislative measures to alter aspects of the upper house of the Parliament of Canada were in fact constitutional amendments going to the fundamental features and institutional design of the Senate, and thus subject to the Constitution's complex and stringent multilateral procedures.<sup>4</sup>

I appeared before the Supreme Court as one of counsel in each of these references. It should come as no surprise, then, that Richard Kay's writings have often been much on my mind when it comes to the theory and practice of constitutional law in Canada, and the elucidation of ideas and principles associated with constitutionalism and the rule of law in liberal democratic federations like ours.

#### I. CANADA AND THE UNITED STATES: POINTS OF CONSTITUTIONAL CONVERGENCE AND DIVERGENCE

The constitutional frameworks and legal systems of Canada and the United States share much in their design and traditions. We both have a British common-law constitutional heritage that we like to trace back romantically to the English *Bill of Rights* of 1689 or indeed, the *Magna Carta* of 1215. We each possess a written document—or in in the Canadian case, a compendious list of Acts and instruments—declared by the Constitution itself to be the “supreme law” of the land, with a federal division of legislative powers between central and local legislatures, an entrenched bill of rights, and express legal procedures for constitutional amendment. Americans have Article V of the Constitution of the United States; Canadians have Part V of the *Constitution Act, 1982*. The Acts of Congress and Parliament and of state and provincial legislatures are, generally speaking, subject to constitutional judicial review; the doctrine of the separation of executive, legislative, and judicial powers (still, in some ways, an emerging doctrine in Canada) is also always in play. Moreover, generally speaking, with controversial and debatable exceptions, we share an abiding commitment to judicial independence and the rule of law. These are some, but by no means all, of the features common to our two constitutions.

However, our countries are also constitutionally distinct in other important respects. Unlike the United States, which is a republic with a presidential and congressional system of government, Canada is a constitutional monarchy with a parliamentary system of representative and

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<sup>3</sup> Reference re Secession of Quebec, [1998] 2 S.C.R. 217, 218 (Can.).

<sup>4</sup> Reference re Senate Reform, [2014] 1 S.C.R. 704, 709–10.

responsible government. Moreover, although the Dominion of Canada established in 1867 in what was then known as British North America has become as much a sovereign and independent state as the great republic whose independence was declared in 1776, Canada achieved its independence incrementally over a comparatively long period. This independence was legally accomplished through the *Statute of Westminster, 1931* and the *Canada Act 1982*, statutes enacted originally by the United Kingdom Parliament, but which are now part of the law of the Constitution of Canada in a domestic and internal sense.<sup>5</sup>

## II. NO PREDOMINANT REVOLUTIONARY TRADITION IN CANADIAN CONSTITUTIONAL DISCOURSE OR JURISPRUDENCE

A corollary to this is that Canada has had no revolutionary act or moment at the core of its founding, and thus no strong revolutionary tradition or predominant current in its constitutional discourse and legal theory. It is a truism oft repeated that Canadians and Canadian political institutions favor, in the main, evolution over revolution. American constitutional thinkers, on the other hand, have had to explain the Declaration of Independence, the Articles of Confederation, and ultimately, the establishment of the Constitution of the United States in ways which plausibly and coherently account for the break with the old legal order and which celebrate the undoubted virtues of new beginnings and new constitutional moments.

Many American scholars perhaps naturally tend to see legal (and illegal) revolutions occurring where most of their Canadian counterparts will only want to sustain, where possible, legal stability and continuity. This is probably, of course, a gross generalization, but it is put this way to make an important point. Canadian constitutionalism, particularly legal constitutionalism, abhors revolution as a means by which to achieve fundamental political change. This is not to deny the existence or current legitimacy of many states that have achieved their sovereignty through unilateral declarations of independence and similar forms of regime change resulting in legal discontinuity, but it is to affirm that this has not been the Canadian tradition.

Constitutional Law Professor Emeritus Stephen Scott of McGill University, in his written brief to the Supreme Court in the aforementioned *Manitoba Language Rights Reference*, put it eloquently in dealing with the potential resort, in that instance, to doctrines such as state necessity and the resort to *de facto* authority (notably as invoked in some of the American civil war cases):

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<sup>5</sup> Statute of Westminster, 1931, 22 Geo. V c. 4 (UK); Canada Act 1982, c. 11 (UK), reprinted in R.S.C. 1985 (Can.); Constitution Act, 1867, c. 3 (UK), reprinted in R.S.C. 1985 (Can.).

Anglo-Canadian public law is deeply legitimist—which is another way of saying, deeply committed to constitutionalism. *Law must be made according to law—and not otherwise . . .*

Doctrines of state necessity, public convenience, and *de facto* authority are means of escape from the discipline of the principles of legality. They are confessions of the failure of the legal system, not marks of its success . . . They carry temptations for the political authorities, and correlative dangers for the legal system and the rule of law. They must not be the *first* resort, but the *last*; and *then only to the extent strictly necessary*.<sup>6</sup>

Professor Scott continued inexorably in his argument towards a broader, but equally profound, observation:

Nor should every substantial illegality be excused on the basis that a revolution has occurred, and a legal order commenced, whereunder the Court is acting. Rather the Courts must maintain the continuity of the legal order from the earliest possible date. *Every fundamental legal discontinuity—every new revolutionary commencement—represents a successful and profound attack on constitutionalism itself, and a trauma for the legal system.*<sup>7</sup>

In the *Manitoba Language Rights Reference*, the Supreme Court did not shrink from the consequences of its decision to invalidate ninety years of Manitoba laws for want of compliance with the manner-and-form requirements of law-making prescribed by the Constitution of Canada.<sup>8</sup> The unconstitutional statutes were declared to be “of no force or effect” pursuant to section 23 of the *Manitoba Act, 1870* and the supremacy clause in section 52 of the *Constitution Act, 1982*.<sup>9</sup> That declaration was consistent with the principles of constitutionalism and the rule of law. However, “because of the Manitoba Legislature’s persistent violation of the constitutional dictates of the *Manitoba Act, 1870*,” the Province of Manitoba was, the Court also recognized, “in a state of emergency.”<sup>10</sup> The Court canvassed analogous cases on state necessity but was careful to further the application of the principle of the rule of law in deeming

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<sup>6</sup> Stephen A. Scott, factum filed on behalf of Alliance Québec, in the Supreme Court of Canada, on May 25, 1984, in *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721 (emphasis in original paras. 48, 57) (parenthetical numbering of points internal to para. 57 removed).

<sup>7</sup> *Id.* para. 61.

<sup>8</sup> *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. at 723.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 766.

Manitoba laws valid and effective for the “minimum period of time necessary for translation, re-enactment, printing and publishing of these laws.”<sup>11</sup>

In the *Quebec Secession Reference*, the Supreme Court noted that the *Constitution Act, 1867*’s mention, in its preamble, of Canada having “a Constitution similar in Principle to that of the United Kingdom” had emphasized “the continuity of constitutional principles, including democratic institutions and the rule of law; and the continuity of the exercise of sovereign power transferred from Westminster to the federal and provincial capitals of Canada.”<sup>12</sup> The Court went on to observe that “Canada’s evolution from colony to fully independent state was gradual” and that “Canada’s independence from Britain was achieved through legal and political evolution with an adherence to the rule of law and stability.”<sup>13</sup> The *Statute of Westminster, 1931*, had “confirmed in law what had earlier been confirmed in fact by the Balfour Declaration of 1926, namely, that Canada was an independent country.”<sup>14</sup> The proclamation of the *Constitution Act, 1982* had “removed the last vestige of British authority over the Canadian Constitution”:

Legal continuity, which requires an orderly transfer of authority, necessitated that the 1982 amendments be made by the Westminster Parliament, but the legitimacy as distinguished from the formal legality of the amendments derived from political decisions taken in Canada within a legal framework which this Court, in the *Patriation Reference*, had ruled was in accordance with our Constitution.<sup>15</sup>

In the *Secession Reference*, the Supreme Court refused to entertain arguments proffered by certain academics at the time that the secession of a province of Canada would be beyond the contemplation of the existing constitutional order and thus would be an entirely political and extralegal, or supraconstitutional, phenomenon. Rather, the Court held that although the Constitution’s amending procedures were silent on the subject of secession, that did not mean that the legal aspects of secession were beyond their reach.<sup>16</sup> “Secession,” the Court stated, “is a legal act as much

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<sup>11</sup> *Id.* at 768.

<sup>12</sup> *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, 245, para. 44 (Can.).

<sup>13</sup> *Id.* at 246, para. 46.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 246–47, paras. 46–48 (“We think it apparent from even this brief historical review that the evolution of our constitutional arrangements has been characterized by adherence to the rule of law, respect for democratic institutions, the accommodation of minorities, insistence that governments adhere to constitutional conduct and a desire for continuity and stability.”).

<sup>16</sup> *Reference re Secession of Quebec*, [1998] 2 S.C.R. at 235.



as a political one,” and “the legality of unilateral secession must be evaluated, at least in the first instance, from the perspective of the domestic legal order of the state from which the unit seeks to withdraw.”<sup>17</sup> “The secession of a province from Canada,” the Court held, “must be considered, in legal terms, to require an amendment to the Constitution,” because “an act of secession would purport to alter the governance of Canadian territory in a manner which undoubtedly is inconsistent with our current constitutional arrangements.”<sup>18</sup> The fact that the changes would be “profound,” and potentially “radical and extensive,” did “not negate their nature as amendments to the Constitution of Canada.”<sup>19</sup>

The Supreme Court also rejected the idea of a constitutional principle of effectivity, akin to the doctrine of necessity, which had been urged upon it by the *amicus curiae* in the Reference.

In our view, the alleged principle of effectivity has no constitutional or legal status in the sense that it does not provide an *ex ante* explanation or justification for an act. In essence, acceptance of a principle of effectivity would be tantamount to accepting that the National Assembly, legislature or government of Quebec may act without regard to the law, simply because it asserts the power to do so. So viewed, the suggestion is that the National Assembly, legislature or government of Quebec could purport to secede the province unilaterally from Canada in disregard of Canadian and international law. It is further suggested that if the secession bid was successful, a new legal order would be created in that province, which would then be considered an independent state.

Such a proposition is an assertion of fact, not a statement of law. It may or may not be true; in any event, it is irrelevant to the questions of law before us. If, on the other hand, it is put forward as an assertion of law, then it simply amounts to the contention that the law may be broken as long as it can be broken successfully. Such a notion is contrary to the rule of law and must be rejected.<sup>20</sup>

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<sup>17</sup> *Id.* at 263, para. 83.

<sup>18</sup> *Id.* para. 84.

<sup>19</sup> *Id.* at 263–64, para. 84. For further discussion, see generally WARREN J. NEWMAN, THE QUEBEC SECESSION REFERENCE, THE RULE OF LAW AND THE POSITION OF THE ATTORNEY GENERAL OF CANADA (1999); Richard S. Kay, *The Secession Reference and the Limits of Law*, 10 OTAGO L. REV. 327, 327 (2003) (characterizing the opinion of the Supreme Court of Canada in the *Secession Reference*); Stéphane Dion, *Secession and the Virtues of Clarity*, 44 OTTAWA L. REV. 403, 405 (2012) (arguing the universality of the opinion on secession).

<sup>20</sup> *Reference re Secession of Quebec*, [1998] 2 S.C.R. at 275, paras. 107–108.

The idea that Canada's procedures for constitutional amendment might contemplate the possibility of, and contain the means for, effecting the secession of a province from the Canadian federal state lawfully, through legal and properly enacted alterations to the Constitution of Canada itself, served as a way of channeling the political forces that were militating in favor of such radical changes through a constitutional framework and parameters. While ruling that a unilateral declaration of independence would be unlawful, the Supreme Court of Canada's opinion in the *Secession Reference* carefully balanced considerations of legality and legitimacy, legal and political constitutionalism, democracy and the rule of law, and federalism and the protection of minorities<sup>21</sup> in a way that made the lawful processes of the Constitution attractive to Canadian federalists and Quebec sovereigntists alike, insofar as both would have a stake in the proper workings of the Constitution and in principled discussions aimed at accomplishing constitutionally achievable ends. This may be contrasted in some measure with the American experience of the Civil War, the Confederacy of secessionist states, and the judgment of the Supreme Court of the United States in *Texas v. White*, in which the Court held that "[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."<sup>22</sup>

### III. RICHARD KAY'S *CONSTITUTIONAL CHRONONOMY*

In his thoughtful paper, *Constitutional Chrononomy*, Professor Richard Kay wove together certain strands of his earlier writings on constitutionalism but with a particular focus on the temporal ambitions of constitution-making and the temporal limitations on constitutional life-spans.<sup>23</sup> There is a low-key, patient, but clear and compelling (and in places, relentless and implacable) logic to most and perhaps all of Professor Kay's essays, and *Constitutional Chrononomy* fits well within this pattern. The themes herein enunciated may be summarized and paraphrased in part as follows: the singular purpose of constitution-making is to control the future behavior of the state, by articulating, in advance, rules of state conduct which will minimize the extent to which the state interferes in the lives of its citizens.<sup>24</sup> The constitution establishes (*i.e.*, constitutes) institutions and sets out the procedures that must be followed to effect genuine and authentic (or authoritative) acts of government.<sup>25</sup> The constitution also prohibits certain activities by government, and

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<sup>21</sup> See *id.* paras. 76–77 (discussing these balanced considerations).

<sup>22</sup> *Texas v. White*, 74 U.S. 700, 725 (1868).

<sup>23</sup> See generally Richard S. Kay, *Constitutional Chrononomy*, 13 *RATIO JURIS* 31 (2000).

<sup>24</sup> *Id.* at 31.

<sup>25</sup> *Id.*

occasionally, sets forth affirmative duties on government.<sup>26</sup> These aim, through scriptural injunctions (“thou shalt” and “thou shalt not”), to confirm power within acceptable limits by requiring decisions to be taken with the concurrence of diverse interests.<sup>27</sup> The sanction for not respecting the constitutional processes specified, or acting in conflict with the constitutional protections afforded or the stipulations prescribed, is that non-compliant government acts are generally treated as ineffective (or in the terms of section 52 of Canada’s *Constitution Act, 1982*, “of no force or effect”).<sup>28</sup> Like that of all rules, the enactment of constitutional rules “supposes that future actors will understand them and heed them. Their success thus depends on an attitude that, by definition, respects the act of constitution-making, a particular historical event.”<sup>29</sup>

There is, Professor Kay observed, “a chronomic aspect to every constitution” that “marks out not merely a social, geographic and political space but also a limited interval in time.”<sup>30</sup> The “linkage between constitutionalism and the passage of time” is threefold: (i) “constitution-making requires an acute awareness of the inevitably unpredictable course of future events”; (ii) “constitutional interpretation and application demands attention to that historical act of constitution-making”; and (iii) “*the act of resisting and finally terminating the authority* of a given constitution will involve a comparison between past beliefs, plans and aspirations embodied in the relevant constitution and those of the new society which it purports to govern.”<sup>31</sup> The balance of his paper is devoted to these three features: “Looking Forward,” “Looking Back,” and “Temporal Dysfunction.”<sup>32</sup>

In terms of looking ahead, Professor Kay’s leitmotif, so elegantly developed in his earlier essay, *American Constitutionalism*,<sup>33</sup> is that “[t]he central social function of constitutions is the prevention of a proven danger—overreaching by the state.”<sup>34</sup> Legal rules of institutional design, procedure, and substance are the machinery by which the exercise of the state’s powers are confined within predetermined and set limits, in keeping with the liberal view that “human thriving is most likely to be obtained in a life that is largely self-defined,”<sup>35</sup> and that at least a minimum core of *a priori* rules that bind the state, either procedurally or in substance, allow

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<sup>26</sup> *Id.* at 32.

<sup>27</sup> *Id.* (internal quotation marks omitted).

<sup>28</sup> *Constitution Act, 1982*, reprinted in R.S.C. 1985, app. II, no. 44, § 52(1) (Can.).

<sup>29</sup> Kay, *supra* note 23, at 32.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* (emphasis added).

<sup>32</sup> *Id.* at 33, 37, 41.

<sup>33</sup> Kay, *supra* note 1.

<sup>34</sup> Kay, *supra* note 23, at 33.

<sup>35</sup> *Id.*

for individual planning and personal autonomy in a private sphere or space that is reasonably secure from unwarranted, unannounced, and capricious intrusions by the state. On this basis, “constitutional rules must be relatively long lived” if constitutional protections are to be effective in making “individual planning possible.”<sup>36</sup> Without the specification of “a more or less permanent set of rules of state conduct,” the “central feature of constitutionalism”—the ability “to predict what the state will and will not do in relation to the projected conduct of individuals”—will be “subverted if the constitution undergoes repeated changes”: “there is an intrinsic incompatibility between constitutions and continuous constitutional revision.”<sup>37</sup>

Professor Kay recognized, of course, that most constitution-makers, while motivated with the intention that the supreme rules they are drafting will likely operate well into an indefinite future, will also understand that a constitution, as a human and therefore perfectible instrument, cannot be entirely immutable, and thus will also make some provision for constitutional amendment.<sup>38</sup> That amendment procedure will, however, (if properly designed) “take into account the need for long-term stability” and thus “make the successful adoption of amendments difficult.”<sup>39</sup>

Constitutional drafters therefore “work on the assumption that the rules they establish will remain in place relatively unchanged for a long period of time,” that “frequent amendment cannot be expected” (nor would it be a good thing); and that “the world in which those rules will be applied will not stand still.”<sup>40</sup> This desire for longevity in a changing world commends a prudential approach that narrows the range of matters subject to constitutional control, and avoids strictly defining or hedging in governmental powers “with limits so specific” as to disable effective government.<sup>41</sup> Moreover, “[t]he promulgation of a constitution, being an event both important and infrequent, is generally thought to require an extraordinarily broad political consensus in order to invest it with that legitimacy which will allow it to function effectively over the long term.”<sup>42</sup> This long-term desideratum and the need for consensus will “move the constitution-makers to limit themselves” to imposing only those limitations and protections that are “believed essential for future safety.”<sup>43</sup>

In terms of looking back, if constitution-makers must “speculate about the future” in which their provisions will be applied, then it follows, in

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 34.

<sup>41</sup> *Id.* at 35.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 35–36.

Professor Kay's view, that those who are subsequently subject to the constitution must look back to glean the framers' intentions "in order to understand the content of constitutional limitations."<sup>44</sup> In this part of his paper, Professor Kay covered well-trodden ground, eschewing the living-tree approach (predominant in Canada)<sup>45</sup> to constitutional interpretation as "in tension with a central aspect of the enterprise of constitutionalism."<sup>46</sup> Constitutions are designed to restrict state action by setting out "structures, procedures and substantive rules" with a view toward applying them into the future: "[t]his exercise is nothing if not a judgment that the constituent decisions" embodied in the supreme law of the constitution "are to be preferred to the subsequent official decisions" (particularly, one might add, when the latter are in conflict with the former).<sup>47</sup> A constitution that is always being adapted through judicial interpretation to deal with current problems and needs is, in Professor Kay's stark assessment, "no constitution at all."<sup>48</sup>

Professor Kay was only slightly more sanguine about the textualist approach to constitutional interpretation, insofar as it "defines somewhat stricter limits for interpretation than the more general 'living constitution' model. The words of the constitution themselves restrict the number of possible interpretations by limiting them to those consistent with the standard definitions of the words of the textual provision invoked."<sup>49</sup> However, the textualist approach, being "another attempt to extirpate historical references from the process of constitutional application," carries its own share of issues, including "problems that are especially troublesome for the idea of a constitution as an *a priori* and relatively stable set of rules for public action."<sup>50</sup> To the extent that textualism permits the possibility of more than one meaning of the constitutional text, it renders the constitution's meaning "intrinsically uncertain," which limits its capacity to draw with assurance the limits of state intrusion and "the boundaries of undisturbed private conduct."<sup>51</sup> As well, in Professor Kay's view, "the refusal to inquire into the specific meaning attached to a constitutional rule by its enactors undercuts the claim of the constitution to be regarded as authoritative."<sup>52</sup> The normative force of constitutions is at

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<sup>44</sup> *Id.* at 37.

<sup>45</sup> Warren J. Newman, *Of Castles and Living Trees: The Metaphorical and Structural Constitution*, 9 J. PARLIAMENTARY & POL. L. 471, 471–97 (2015) (exploring some competing structural and animating metaphors of constitutionalism).

<sup>46</sup> Kay, *supra* note 23, at 38.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 38–39.

<sup>52</sup> *Id.* at 39.

least in part made possible by “appeals to the solemn decision of ‘the people’ in creating them,” such that the constitution’s legitimacy cannot be “divorced from its historical origins,” and the idea that “it is the product of some shared purpose amongst a group of people” who for that constitutional moment and into the future were believed to be “the right people to make fundamental decisions for a polity.”<sup>53</sup>

So far, this analytical discourse is unsurprising and largely uncontroversial, for those who have read Professor Kay’s *American Constitutionalism* and similar writings, and the propositions are put with his usual elegant flair. However, it is the final part of the paper, dealing with “Temporal Dysfunction,” which gives this Canadian constitutional lawyer some pause; not so much in the diagnostic, but in the remedy.

Professor Kay contended that if, as discussed, “the great ambition of constitution-makers is to bind the future to the values of the present,” then “the great problem for this enterprise is the inability to predict with confidence how the future will look and how human beings whose actions are to be controlled will respond in that unpredictable time to come.”<sup>54</sup> Techniques, both in the drafting and in the interpretation of constitutions, have been noted to mediate the issue and mitigate its effects. Yet “sooner or later every constitution will begin to chafe,” and it is “inevitable that urgent needs or intolerable evils will appear that were simply unforeseeable at the time of constitution-making.”<sup>55</sup> The “ordering of social values that informed the initial constitutional decisions may shift significantly,” and there “will then develop a misalignment between the constitution and the social and political realities” now obtaining.<sup>56</sup>

Of course, constitutional misalignment may be corrected, to some degree, through constitutional amendment and judicial interpretation. But in many cases, the natural tendency will be to “do nothing” and to tolerate, to the extent possible, the increasing anomalies caused by the “lack of fit” between the “now obsolete constitutional text” and “important social factors” rather than “undertak[ing] the difficult and traumatic process of full-blown constitutional replacement.”<sup>57</sup>

Professor Kay continued by noting that “[a]lthough every constitution exhibits an increasingly poor fit with contemporary facts and values, such constitutions will be tolerated until some issue arises the importance of which justifies an explicit re-examination.”<sup>58</sup> He gave the example of Canada’s Constitution as exhibiting a significant and persistent

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 41.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 42.

<sup>58</sup> *Id.*

misalignment in that, while Canada had become a sovereign state, its formal constitutional amendment process continued to lie with the United Kingdom Parliament.<sup>59</sup> This occasioned only “minor inconvenience” until 1982, when the then-federal government sought to “exploit the formal but outdated rules to effect a substantial and concrete change.”<sup>60</sup> For Canada, “a change in the constitutional amendment rules emerged only after the federal government, contrary to long-standing practice, attempted to secure a new amendment procedure and an entrenched Bill of Rights, by requesting an act of the United Kingdom Parliament without obtaining agreement from provincial governments.”<sup>61</sup> However, I would add that ultimately, constitutional change was effected legally, and in accordance with the constitutional conventions that had developed through past practices. There was a strain on the constitutional system, particularly with respect to Quebec, but there was no revolutionary break with the old order.<sup>62</sup> As the Supreme Court of Canada observed: “*The Constitution Act, 1982* is now in force. Its legality is neither challenged nor assailable.”<sup>63</sup>

Professor Kay made a good point when he observed that although “every modern constitution provides machinery for its own amendment,” a constitution “must provide some minimal amount of stability and predictability,” and thus, in this respect, “the amendment procedures must be designed to frustrate frequent change.”<sup>64</sup> He then asked rhetorically: “What happens when an unchanged—and practically unchangeable—constitution becomes politically unacceptable?”<sup>65</sup>

Judicial refitting of the constitution to current need through a process of progressive interpretation—the “living tree” approach—if it takes the constitution beyond the “categories created by the original enactors,” must, in Professor Kay’s view, “amount to an irregular amendment of the constitution by its interpreters.”<sup>66</sup> While judicial construction of this kind “may successfully realign the constitution,” it will also be “subversive of constitutionalism” by increasing legal uncertainty as to what the constitutional rules are, thereby undermining the security one seeks in

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 42–43.

<sup>62</sup> It is true that the Committee on the Constitution of the Canadian Bar Association, in its report, *Towards a New Canada*, published in 1978, did recommend the “dramatic gesture” of a unilateral declaration of independence in proclaiming a new Canadian constitution; it is a testament to the sagacity and prudence of the Canadian political leaders of the day that they emphatically chose the path of legality, through a final enactment of the United Kingdom Parliament, instead. COMM. ON THE CONSTITUTION, CANADIAN BAR ASS’N, TOWARDS A NEW CANADA 6 (1978).

<sup>63</sup> Re: Objection by Quebec to a Resolution to Amend the Constitution, [1982] 2 S.C.R. 793, 806 (Can.).

<sup>64</sup> Kay, *supra* note 23, at 43.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 44.

establishing a constitution.<sup>67</sup> Kay gave the example of the American Constitution as one that has been substantially changed through the course of litigation and judicial interpretation, which has “significantly reduced . . . the settling and securing functions of the constitution.”<sup>68</sup>

#### IV. CONSTITUTIONAL AND REVOLUTIONARY CHANGE

However, having regard to the limitations inherent in both the formal constitutional amendment and judicial interpretation processes, Professor Kay posited that “[a]t some point the constitution becomes incorrigibly unsuitable for the polity it is meant to govern. *At this point the only avenue open for dealing with the problem is an explicit departure from law the old constitution has established.*”<sup>69</sup> This, to a Canadian jurist, is like saying that sooner or later an asteroid will hit the earth and destroy all forms of higher life.

Professor Kay hastened to add that “[t]his kind of constitutional change need not be violent or even particularly disruptive. What it requires is that there be a palpable departure from the authority of the existing constitution.”<sup>70</sup> A well-known illustration was the departure from the Articles of Confederation and the enactment of the Constitution of the United States between 1787 and 1789, which was accomplished “through peaceful, although unauthorized, procedures.”<sup>71</sup>

Indeed, he went on to contend that there are “advantages to changing constitutions through overtly illegal means.”<sup>72</sup> The new constitutional and legal order would, Kay suggested, “be able to draw legitimacy from the events of the change.”<sup>73</sup> That, of course, is true only if the founders of the new order are generally perceived, I would note, as acting legitimately in overthrowing the existing legal regime, and are not considered to be revolutionary usurpers, acting without legal authority to impose their will by force.

Professor Kay argued as well that “[t]he quality of the constitutional rules created may also be compromised by failing to acknowledge the break in legal continuity.”<sup>74</sup> It will be harder to meet “special needs” of constitutional lawmaking “if the process is disguised as mere subconstitutional change.”<sup>75</sup> A “transparently illegal action allows

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 45.

<sup>69</sup> *Id.* (emphasis added).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 45–46.

<sup>72</sup> *Id.* at 46.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*



subsequent interpreters of the new constitutional rules to place them in the true context of their creation.”<sup>76</sup> Attempting to reconcile those rules with the pre-existing constitutional authority may obscure their meaning and thereby undermine “the constitutionalist desiderata of stability and clarity.”<sup>77</sup> Yet to this, I must add, as a plaintive aside, what about the constitutionalist desiderata of maintaining the rule of law?

Professor Kay did allow that where “substantial elements in a society [] remain committed to the prior constitutional regime . . . only a contest of force can effect the necessary constitutional change.”<sup>78</sup> Professor Kay further acknowledged that “[w]hen the resistance comes from the official holders of power, the result is a revolution. A successful revolution is the clearest possible indication that time has made the existing constitution unsuitable.”<sup>79</sup>

Kay then made another key observation: “It is remarkable, however, how often genuine revolutionaries seek to connect their actions in one way or the other to the artifacts of the legal system they are displacing,”<sup>80</sup> pointing to the Glorious Revolution of 1688-89 in England<sup>81</sup> and to the declarations of the President of the unilaterally seceding states in the Confederacy.<sup>82</sup>

The same point could have been made with regard to the Draft Bill on the Sovereignty of Quebec which was introduced in the National Assembly in December 1994, and which contained within it the terms of a unilateral declaration of independence.<sup>83</sup> As I wrote some years ago:

What it portended was nothing less than a revolution, an overthrow of the established legal order of Canada. But it was a revolution that dared not speak its name. The “Declaration of Sovereignty” was to be clothed in statutory form, and on its face the Act would promise continuity, not chaos. However, by an artful sleight of hand, the legislature of the province of Quebec, which exercises its powers under the Constitution of Canada, would be replaced by the

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Professor Kay subsequently wrote his eloquent masterwork on this question. See RICHARD S. KAY, *THE GLORIOUS REVOLUTION AND THE CONTINUITY OF LAW* 2 (2014) (“[T]he need to accommodate the law was not a mere irritant. It was a powerful constraint on what the revolutionaries did and, certainly, on what they said. The pull of legality and the shame of illegality were continuous, insistent, and intense.”).

<sup>82</sup> Kay, *supra* note 23, at 47.

<sup>83</sup> Draft Bill, An Act respecting the Sovereignty of Québec, Quebec Nat’l Assemb., 1st Sess., 35th Leg. (1994).

National Assembly of the independent state of Quebec, exercising powers under the new régime purportedly established by the sovereignty legislation itself.<sup>84</sup>

As Professor Kay finally conceded, “The same craving for stability that animates constitutionalism may make the appearance of some form of legal continuity essential to generate the political acceptability even of revolutionary change.”<sup>85</sup>

#### V. CONSTITUTIONAL CHRONOMETRY AND THE FUTURE REACH OF COMPARATIVE CONSTITUTIONAL LAW

All in all, the thesis mooted in *Constitutional Chronometry* strikes me (and with the greatest of respect for its author) as somewhat of an exercise in armchair philosophy. Revolutionary breaks with existing constitutional and legal orders are not the inevitable outcomes of anachronistic constitutions, however much revolutionaries may attempt to justify their actions *ex post facto* in that light. If revolutions do occur and liberal constitutions are overthrown, it will not be because the constitutions themselves are out of date, but because the commitment to constitutionalism itself has been abandoned.

Indeed, as the tenets of modern constitutionalism continue to develop, it appears to this Canadian participant that a convergence on basic constitutional norms and constitutions is occurring. The importance to all modern states of the rule of law, the separation of powers, judicial independence, democratic and representative political institutions, free and fair elections, the protection of minorities, and fundamental rights cannot be gainsaid. Legal continuity is a corollary, and stability a desirable effect, of the maintenance of the rule of law. American comparativists, such as Richard Kay, Mark Tushnet, Vicki Jackson, Mark Graber, Bruce Ackerman, and the late Norman Dorsen, have worked hard to ensure that the great ideas and enterprise of constitutionalism are perpetuated, not upended and replaced. The opening words of Professor Kay’s chapter on “*American Constitutionalism*” carry this normative message forward in clear, matter-of-fact, and eloquent terms:

As the twentieth century comes to a close, the triumph of constitutionalism appears almost complete. Just about every state in the world has a written constitution. The great majority of these declare the constitution to be law controlling the organs of the state. And, in at least many

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<sup>84</sup> W.J. NEWMAN, THE QUEBEC SECESSION REFERENCE: THE RULE OF LAW AND THE POSITION OF THE ATTORNEY GENERAL OF CANADA 7 (1999).

<sup>85</sup> Kay, *supra* note 23, at 46.

states, that constitution is, in fact, successfully invoked by courts holding acts of the state invalid because inconsistent with the constitution. This development is generally thought to be a tribute to an especially American idea. Although there is considerable variation in the substantive contents and structural machinery of constitutionalism in various countries, the central idea, forged in the American founding, of public power controlled by the enforcement of a superior law is present everywhere constitutional government is proclaimed.<sup>86</sup>

The events of the first two decades of the twenty-first century might suggest to some, both cynics and idealists alike, that the words above were reflective only of hubris, and that in Europe, the Middle East, Asia, and the Americas, the ideas, tenets, and values of constitutionalism are being threatened, rolled back, or are otherwise under siege.

That said, the normative potential and influence of the discipline of comparative constitutional law is greater than ever before. This is due, in the main, to the exponential availability and distribution of constitutional texts, doctrine, and jurisprudence, through the Internet and other modes of instantaneous electronic communication; the burgeoning initiatives of the academy such as the I-Connect Blog;<sup>87</sup> the reports and opinions of academic or expert advisory bodies such as the Bingham Centre for the Rule of Law;<sup>88</sup> the Constitution Unit at University College London;<sup>89</sup> the European Commission on Democracy through Law<sup>90</sup> (the Venice

<sup>86</sup> Kay, *supra* note 1, at 16 (citations omitted).

<sup>87</sup> See Tom Ginsburg, *Welcome Message from Tom Ginsburg*, I-CONNECT: INT'L J. CONST. L. BLOG, <http://www.iconnectblog.com/welcome-message-from-tom-ginsburg/> (last visited Feb. 13, 2020) ("Our goals, succinctly, are several. We want a place for real-time updates on important new constitutional cases, amendments, constitution-making efforts and other new developments. We hope to also provide a forum for thoughtful analysis of major issues in the field of comparative constitutional law.").

<sup>88</sup> See *Mission and Strategic Aims*, BINGHAM CTR. FOR RULE L., <https://binghamcentre.bicl.org/mission-strategicaims> (last visited Feb. 13, 2020) ("Our mission is simple: to advance the Rule of Law worldwide.").

<sup>89</sup> See *About Us*, CONSTITUTION UNIT UCL, <https://www.ucl.ac.uk/constitution-unit/about-constitution-unit/about-us> (last visited Feb. 13, 2020) ("The Constitution Unit conducts timely, rigorous, independent research into constitutional change and the reform of political institutions. Our research has significant real-world impact, informing policy-makers engaged in such changes - both in the United Kingdom and around the world.").

<sup>90</sup> See *For Democracy Through Law*, VENICE COMMISSION ON COUNCIL EUR., [https://www.venice.coe.int/WebForms/pages/?p=01\\_Presentation&lang=EN](https://www.venice.coe.int/WebForms/pages/?p=01_Presentation&lang=EN) (last visited Feb. 13, 2020) ("The role of the Venice Commission is to *provide legal advice* to its member states and, in particular, to help states wishing to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law. It also helps to ensure *the dissemination and consolidation of a common constitutional heritage . . .*").

Commission, celebrating its 30<sup>th</sup> anniversary this year);<sup>91</sup> the World Conference on Constitutional Justice;<sup>92</sup> the Global Network on Electoral Justice;<sup>93</sup> comparative documents such as the Commonwealth Principles on the Three Branches of Government;<sup>94</sup> the Venice Commission's Rule of Law Checklist,<sup>95</sup> and more.<sup>96</sup>

We must continue to harness this theoretical and practical work, to participate in these academic and institutional fora, to nourish and sustain our belief and trust in constitutionalism as a means to establish *a priori* limits on the exercise of state powers, to encourage public actors to stay within those limits, and thus to guarantee us all a margin of safety,

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<sup>91</sup> *Id.*

<sup>92</sup> See *World Conference on Constitutional Justice — 117 Members!*, VENICE COMMISSION ON COUNCIL EUR., [https://www.venice.coe.int/WebForms/pages/?p=02\\_WCCJ](https://www.venice.coe.int/WebForms/pages/?p=02_WCCJ) (last visited Feb. 13, 2020) (“The World Conference on Constitutional Justice unites 117 Constitutional Courts and Councils and Supreme Courts in Africa, the Americas, Asia, Australia/Oceania and Europe. It promotes constitutional justice – understood as constitutional review including human rights case-law – as a key element for democracy, the protection of human rights and the rule of law . . .”).

<sup>93</sup> See GLOB. NETWORK ON ELECTORAL JUSTICE, CONSTITUTIVE ACT 1, [https://www.te.gob.mx/red\\_mundial/media/pdf/d1986e1d9e6a084.pdf](https://www.te.gob.mx/red_mundial/media/pdf/d1986e1d9e6a084.pdf) (last visited Feb. 13, 2020) (“The Global Network on Electoral Justice will pursue the following objectives: First. Facilitate the exchange of judicial-electoral information and the cooperation between members and associates of the Network. Second. Identify and exchange best practices for the advancement of Tribunals, Courts, and Judicial Electoral Bodies worldwide.”).

<sup>94</sup> See COMMONWEALTH SECRETARIAT ET AL., COMMONWEALTH (LATIMER HOUSE) PRINCIPLES ON THE THREE BRANCHES OF GOVERNMENT 10 (2009), <http://www.cpahq.org/cpahq/cpadocs/Commonwealth%20Latimer%20Principles%20web%20version.pdf> (“The objective of these Principles is to provide, in accordance with the laws and customs of each Commonwealth country, an effective framework for the implementation by governments, parliaments and judiciaries of the Commonwealth’s fundamental values.”).

<sup>95</sup> VENICE COMM’N, RULE OF LAW CHECKLIST 12 (2016), [https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule\\_of\\_Law\\_Check\\_List.pdf](https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf) (“The present checklist is intended to build on these developments and to provide a tool for assessing the Rule of Law in a given country from the view point of its constitutional and legal structures, the legislation in force and the existing case-law. The checklist aims at enabling an objective, thorough, transparent and equal assessment.”).

<sup>96</sup> To this list one might add the Clough Centre for the Study of Constitutional Democracy at Boston College, the Centre for Constitutional Studies at the University of Alberta, the Public Law Centre of the University of Ottawa, and many more such bodies. See Vlad Perju, *From the Director*, BOS. C.: CLOUGH CTR. FOR STUDY CONSTITUTIONAL DEMOCRACY, <https://www.bc.edu/content/bc-web/centers/clough/about.html> (last visited Feb. 13, 2020) (“The Center strives to reinvigorate and reimagine the study of constitutional democracy in the twenty-first century. By taking a holistic, global, and interdisciplinary approach to constitutional democracy, we seek to foster original research and thoughtful reflection on the promise and challenges of constitutional government in the United States and around the world.”); *About Us*, U. ALBERTA: CTR. FOR CONSTITUTIONAL STUD., <https://ualwccsprod.srv.ualberta.ca/index.php/about-us> (last visited Feb. 13, 2020) (“The Centre for Constitutional Studies is a hub for constitutional research and public education in Canada. It connects leading Canadian and international scholars, contributes to constitutional debate, and creates resources that educate the public about the Constitution.”); *Public Law at uOttawa*, U. OTTAWA: UOTTAWA PUB. L. CTR., <https://commonlaw.uottawa.ca/en/focus-areas/public-law> (last visited Feb. 13, 2020) (“The uOttawa Public Law Centre is Canada’s leading centre for public law research, debate and engagement . . . . The Centre supports and carries out innovative and interdisciplinary research, which it disseminates to diverse audiences in Canada and globally.”).

autonomy, and self-realization. In doing so, we will also preserve the true constitutional and intellectual legacy of Professor Kay.